United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-2013

To be argued by
JACOB LAUFER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-2013

SAMUEL MANARITE,
Petitioner-Appellant,

—v.—

UNITED STATES OF AMERICA,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

Samuel Manarite appeals from an order filed on November 8, 1974 in the United States District Court for the Southern District of New York by the Honorable Edmund L. Palmieri, United States District Judge, denying, without a hearing, Manarite's motion, pursuant to Title 28, United States Code, Section 2255, to vacate his judgment of conviction and sentence.

Indictment 69 Cr. 892, filed on December 16, 1969, charged Manarite and Richard J. Portella with having used extortionate means to collect and attempt to collect an extension of credit from one Phil Frimet, in violation of Title 18, United States Code, Sections 894, and 2. After a trial before the Honorable Edmund L. Palmieri, United States District Judge and a jury, Manarite was, on May 21, 1970, found guilty of the charge; Portella was acquitted.

On July 16, 1970, Manarite was sentenced by Judge Palmieri to fifteen years imprisonment and a $5,000 committed fine.

Manarite's conviction was subsequently affirmed by this Court, *United States* v. *Manarite*, 434 F.2d 1069 (2d Cir. 1970), and certiorari was denied by the United States Supreme Court, 402 U.S. 972 (1971).

On October 28, 1970, Manarite was found guilty of conspiracy (18 U.S.C. § 371) to violate Title 18, United States Code, Section 1465, as charged in Indictment 69 Cr. 747, after a jury trial held before the Honorable Lloyd F. MacMahon, United States District Judge. Manarite was sentenced by Judge MacMahon to eighteen months imprisonment to run consecutively to his period of imprisonment on Indictment 69 Cr. 892, and to a committed fine of $5,000.*

Manarite's petition to the United States District Court for the District of Kansas, Docket No. 74-19-C3, for relief pursuant to Title 28, United States Code, Section 2241, was dismissed in a memorandum and order filed on May 1, 1974, by the Honorable Arthur J. Stanley, Jr., Senior United States District Judge (AA 52a-55a).** The dismissal was affirmed by the United States Court of Appeals for the Tenth Circuit in a per curiam opinion filed on October 30, 1974 (AA 56a-58a).

On June 4, 1974, Manarite moved, pursuant to Title 28, United States Code, Section 2255, to vacate his judgment of conviction and sentence in 69 Cr. 892. In an order with opinion filed November 8, 1974, Judge Palmieri denied the motion without a hearing (AA 70a-75a).

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* His conviction for this offense was affirmed by this Court, *United States* v. *Manarite*, 448 F.2d 583 (2d Cir.), and certiorari was denied, 404 U.S. 947 (1971).

** References in the form "(AA—)" are to the appendix of appellant filed in the instant appeal.

ARGUMENT

POINT I

Manarite's sentence consisted of both a term of imprisonment and a committed fine, each of which was an independent element of the sentence.

Manarite contends that, because the judgment and order of commitment directed that he stand committed until his fine was paid, once having paid the committed fine he has fully satisfied the terms of his sentence, despite its additional provision that he be imprisoned for fifteen years. This contention is absurd.

The ambiguity claimed by Manarite to exist in the written judgment and order of commitment is, as was indicated by Judge Palmieri in his order denying petitioner's motion to vacate his sentence, "a mere conjuring with words." (AA 72a). The United States Court of Appeals for the Tenth Circuit, in affirming the denial of relief sought on the same basis by Manarite in the District of Kansas under Title 28, United States Code, Section 2241, has likewise characterized Manarite's reading of the written judgment and order of commitment "as a distorted construction of the sentence imposed." (AA 57a).

Furthermore, Judge Palmieri's oral pronouncement of sentence on July 16, 1970, explicitly stated that the sentence was to consist both of a term of imprisonment and a separate and distinct committed fine:

> "The Court: All right. I sentence you to serve a term of 15 years in prison and to pay a committed fine of $5,000."

Any ambiguity which may exist in the written judgment and order of commitment is vitiated by the clear, explicit, and controlling oral pronouncement of sentence in the presence of the defendant. *United States* v. *Marquez*, 506 F.2d 620, 621-22 (2d Cir. 1974).

POINT II

A committed fine is a permissible sentence in the case of a defendant who has the means to pay such a fine.

Manarite contends that the committed fine imposed upon him by Judge Palmieri is void as violative of the equal protection guarantees of the United States Constitution. This contention is without merit.

The authorities cited by Manarite in support of his contention that the committed fine to which he was sentenced was violative of the United States Constitution do not support his position, since they are explicit in their holdings that they are not to be construed as indicating that committed fines are unconstitutional in the cases of non-indigent defendants. *Tate* v. *Short*, 401 U.S. 395, 400 (1971); *Williams* v. *Illinois*, 399 U.S. 235, 242 n. 19 (1970). The Court in *Tate* v. *Short* stated that

> "[w]e emphasize that our holding today does not suggest any constitutional infirmity in imprisonment of a defendant with the means to pay a fine who refuses or neglects to do so." 401 U.S. at 400.

Similarly, the Court in *Williams* v. *Illinois* stated that

> "[w]e wish to make clear that nothing in our decision today precludes imprisonment for willful refusal to pay a fine or court costs. See *Ex Parte*

> *Smith,* 97 Utah 280, 92 P.2d 1098 (1939). Cf. *Illinois* v. *Allen,* 397 U.S. 337 (1970)." 399 U.S. at 242 n.19.

Accord, Morris v. *Schoonfield,* 399 U.S. 508, 509 (1970) (concurring opinion); *City of Orlando, Florida* v. *Cameron,* 264 So.2d 421 (Fla. 1972). *See Lebosky* v. *Saxbe,* 508 F.2d 1047, 1051 (5th Cir. 1975); *United States* v. *Gaines,* 449 F.2d 143, 144 (2d Cir. 1971), *cert. denied,* 402 U.S. 1006 (1972).*

Inasmuch as Manarite concedes that he was not indigent (Brief of Appellant 10), and that he has in fact paid the committed fine (AA 59a), his reliance upon *Tate* v. *Short, supra,* and *Williams* v. *Illinois, supra,* in support of his contention that the committed fine imposed upon him was constitutionally void is entirely inappropriate. Furthermore, since Manarite has paid the committed fine and is unable to demonstrate that his period of imprisonment has been or will be lengthened as a result of the fine, he lacks the requisite standing to assert its unconstitutionality. *See Tileston* v. *Ullman,* 318 U.S. 44 (1943); *United States* v. *Hale,* 468 F.2d 435, 437 (5th Cir. 1972).

POINT III

Manarite's claim that the Government suppressed exculpatory evidence was properly rejected by the District Court without a hearing.

In his application in the District Court, filed June 25, 1974, Manarite claimed (at paragraphs 11 and 12) "that counsel for the Government and counsel for the chief prosecution witness in fact had an agreement to the effect that Government counsel would recommend a suspended sentence

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* The long-standing concept of the committed fine, *Williams* v. *Illinois, supra,* at 239, is currently utilized as a sentencing procedure. *See,* e.g., *United States* v. *Fahey,* 510 F.2d 302, 303 n. 1 (1974).

for the witness in a case then pending before a State Court in exchange for his testimony in the instant case," that this asserted agreement had, in fact, been carried out, and that the agreement had been concealed at trial.

This claim was supported by an affidavit by Manarite's wife, which averred that in a telephone conversation in June, 1973, Victor Roberts, Esq., the attorney for the "prosecution's main witness", Phil Frimet, had told her of an agreement between himself and the prosecutors, Stephen Scott and Joel Friedman, "that the United States Government would recommend a suspended sentence for Phil Frimet in a case pending before the State Court in exchange for his cooperation in the case involving my husband, Samuel F. Manarite, and in fact said Stephen H. Scott and Joel Friedman went to the trial judge in whose court Phil Frimet's State action was pending and recommended a suspended sentence" (AA 60a-61a).

In response, the Government filed, on June 28, 1974, an affidavit from Victor Roberts, Frimet's lawyer, denying that he had ever said to Mrs. Manarite what she claimed he had in her affidavit and stating that he had repeatedly rejected her numerous requests to furnish her with an affidavit affirming the factual contentions she was now making, that at no time had the prosecution made any promises in connection with Frimet's testimony in this case, and that about six months after the trial in this case, in connection with Frimet's testimony against Manarite on other charges [see, *supra*, page 2 fn. 1], the Government had promised to advise the state court judge of Frimet's cooperation by letter and that such a letter had been ultimately sent (AA 68a-69a). The Government also filed a portion of Frimet's testimony at the subsequent trial of Manarite before Judge MacMahon, in which Frimet acknowledged the existence of the Government's promise to this effect.*

* Exhibit B to the affidavit of Jerome Merin, filed June 28, 1974.

In response, Manarite filed an affidavit of his counsel, stating that Mrs. Manarite had furnished him with a transcript of her conversation with Roberts, that he had "compared this transcript to the tape-recorded conversation" and that the transcript was accurate. Counsel included a copy of the transcript.*

The record of Manarite's first trial discloses that the question of promises to Frimet in connection with his testimony in that case was taken up during Frimet's testimony —with Frimet, the prosecutor, Special Attorney Scott, defense counsel and Frimet's counsel Victor Roberts. After Frimet's testimony that he had been promised nothing by the Government (AA 27a-29a), his attorney confirmed that no agreements had been made with the Government (AA 31a). Special Attorney Scott added that, insofar as the state charge pending against Frimet was concerned, he had himself decided, after a conversation with the state prosecutor, that he would write a letter to the sentencing state court judge advising that Frimet had testified as a Government witness. Mr. Scott added that, to his knowledge, Frimet had never been informed of this arrangement between Mr. Scott and the state prosecutor, Mr. Aronwald (AA 32a-34a). On the basis of the record before him, Judge Palmieri concluded, later in the trial, that Special Attorney Scott's plan to write to the state court judge ". . . is a plan of Mr. Scott not communicated to Mr. Frimet and not even communicated to his lawyer . . ." (AA 37a).

In the District Court, on Manarite's motion to vacate his conviction, Judge Palmieri, properly characterizing Manarite's claim as "an allegation of undisclosed promises between government counsel and counsel for its chief witness", rejected the claim as "false and unrelated to this case" without a hearing, noting that Manarite had made no showing of when the alleged agreement to recommend a suspended

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* This transcript is in Manarite's appendix on appeal at AA 62a-65a.

sentence in the state court was made and finding that the Government's agreement to help Frimet in the state court was made in connection with Frimet's testimony at Manarite's subsequent trial before Judge MacMahon.

On appeal, Manarite has completely abandoned the claim he made below and now makes an entirely new one. His claim now is, not that the Government concealed any agreements made with Frimet's attorney, but rather that the prosecutor, Frimet, and his lawyer concealed "that Frimet was *personally informed* of the extent the Government would act on his behalf" (Brief at 14-15; emphasis in original). This claim is premised on a brief and ambiguous statement made by a different Government attorney on Frimet's sentence before Judge MacMahon.

First, the claim now made by Manarite was never presented to the District Court. It is based on the transcript of a proceeding, reproduced in Manarite's appendix on appeal, which was not before the District Court, is not part of the record on appeal and indeed is not even part of the record in the District Court of the proceedings leading to the conviction which is now the subject of collateral attack. It is entirely improper for Manarite, represented by the same counsel here and in the District Court, to argue that Judge Palmieri committed error in connection with a claim and evidence that was never presented below. Manarite's present claim may not be raised for the first time on appeal. *United States* v. *Rivera,* Dkt. No. 74-2115 (2d Cir., March 13, 1975) slip op. at 2283-2284; *United States ex rel. Robinson* v. *Vincent,* 506 F.2d 923 (2d Cir. 1974); *Fields* v. *United States,* 438 F.2d 205, 207 (2d Cir. 1971), *cert. denied,* 403 U.S. 907 (1972); *United States ex rel. Springle* v. *Follette,* 435 F.2d 1380, 1384 (2d Cir. 1970), *cert. denied,* 401 U.S. 980 (1971). *Cf. Turco* v. *Warden,* 444 F.2d 56 (4th Cir. 1971).

Second, it is plain that Judge Palmieri properly rejected without a hearing the claim presented by Manarite in the

District Court. The facts alleged by Manarite in support of his claim below were entirely insufficient to warrant either relief or a hearing, for even if Manarite could have proven what his wife's affidavit and transcript asserted, it would have in no way established the suppression at Manarite's trial before Judge Palmieri of any agreement then in existence between Frimet's lawyer and the Government in connection with Frimet's testimony at that trial, a fact which is crucial to the claim of suppression now made. *E.g., Dalli* v. *United States*, 491 F.2d 758, 760 (2d Cir. 1974); *United States* v. *Malcolm*, 432 F.2d 809, 812 (2d Cir. 1970); *Torres* v. *United States*, 370 F. Supp. 1348, 1349-1350 (E.D.N.Y. 1974). The illusory nature of Manarite's contentions below is further established by the full record on this very issue that was made during the course of the trial and by the affidavit of Frimet's counsel, submitted in the District Court in opposition to Manarite's application,* which makes clear what is evident anyway—that the Government's promise of assistance to Frimet in his state court case was not made until after the conviction of Manarite now under attack.

Finally, even taking into account the claim and evidentiary matter which has been improperly put before this Court on appeal, the order of the District Court should not be disturbed. The brief portion of the transcript of Frimet's sentencing before Judge MacMahon on which Manarite seizes hardly supports the weight which he puts on it. Special Attorney Friedman's statement was made in the

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* While "not a part of 'the files and records of the case,'" *Taylor* v. *United States*, 487 F.2d 307, 308 (2d Cir. 1973), this affidavit "may be considered in assessing the sufficiency of the petitioner's supporting affidavit." *Dalli* v. *United States*, 491 F.2d 758, 762 n.4 (2d Cir. 1974). See also *Harris* v. *United States*, 436 F.2d 591 (10th Cir. 1971), in which the District Court denied a hearing under 28 U.S.C. § 2255 after determining, by the use of materials outside the record of the case, that the factual allegations contained in petitioner's affidavit postdated his conviction.

context of Frimet's sentencing before Judge MacMahon on the indictment which was the subject of Manarite's second trial and conviction. While Mr. Freidman's statement in part may be read to suggest that Manarite was told before his testimony at either trial that his cooperation would be brought to Judge MacMahon's attention, that language was preceded by the statement that no promises had been made to Frimet and immediately followed by the assertion that "there were absolutely no guarantees" (AA 46a). Moreover, this ambiguous statement by Mr. Friedman is unsupported by any showing of personal knowledge on his part of the arrangements or absence thereof between the Government and Frimet at the time of Manarite's earlier trial before Judge Palmieri, at which a different prosecutor represented the Government. Given the full record made at Manarite's first trial on the issue of Frimet's expectations when he testified then, the internally inconsistent statements made briefly by a prosecutor not established to have personal knowledge of the facts are insufficient to warrant a hearing or any relief. *Dalli* v. *United States*, *supra*, 491 F.2d at 760; *Williams* v. *United States*, 503 F.2d 995, 998 (2d Cir. 1974). Indeed, some indication of the lack of substance of the present claim is the fact that despite Frimet's testimony on October 7, 1970, at Manarite's second trial, that he knew the Government would intercede on his behalf in the state court, Manarite has waited four-and-a-half years before making any suggestion that this understanding had been reached before Frimet's testimony at his earlier trial before Judge Palmieri.

CONCLUSION

The order of the District Court should be affirmed.

Respectfully submitted,

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JACOB LAUFER

deposes and says that he is employed in the office of the Joint Strike Force for the Southern District of New York.

That on the 24th day of April, 1975 he served 2 copies of the within brief by placing the same in a properly postpaid franked enveloped addressed:

OSCAR B. GOODMAN, ESQ.
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And deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Jacob Laufer
JACOB LAUFER

Sworn to before me this
24TH day of April, 1975

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